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In the Supreme Court of the United States

October Term, 1993

STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

FRANK BURNABY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I OF II (Appendix A To G)

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BURNABY V. STANDARD FIRE INS. CO.
16 Cal.App.4th 135; -- Cal.Rptr.2d -- (June 1993)

[No. B047665. Second Dist., Div. One. [June 1, 1993.]

FRANK BURNABY, Plaintiff and Respondent, v. STANDARD FIRE INSURANCE COMPANY, Defendant and Appellant.

SUMMARY

A jury rendered a special verdict finding that defendant insurer had breached the terms of an insurance contract and had acted in bad faith in doing so. The jury awarded plaintiff insured damages including noncontractual damages, prejudgment interest, and punitive damages. Plaintiff brought the action after defendant denied his claim for property damage that had resulted from destabilization of land. Plaintiff had previously made claims against several governmental agencies upon being informed of land movement in the geographic area near his home. In plaintiff's application for the property insurance, it was reported that there were "no losses prior to the application." (Superior Court of Los Angeles County, No. WEC089584, Richard G. Harris, Judge.)

The Court of Appeal affirmed. It held that sufficient evidence supported the jury's findings that plaintiff had not concealed material facts, that there was no damage prior to the issuance of the policy, and that damage occurred while the policy was in effect. It held that plaintiff's expert

witnesses possessed sufficient skill or expertise such that their testimony on insurance matters would be likely to assist the jury. It also held that sufficient evidence supported the jury's award of damages, and that the award of punitive damages was not improper. It finally held that the insurer was not entitled to assert subrogation rights, notwithstanding that plaintiff had recovered from a third party tortfeasor, since the insurer had not paid on the insured's claim. (Opinion by Dunn, J.,* with Ortega, Acting P.J., and Masterson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a-1d) Insurance Contracts and Coverage § 129—Actions—Evidence—To Support Findings—Jury Determination That Insured Did Not Conceal Material Fact on Application.—In an insured's action against a property insurer arising from defendant's denial of a claim, sufficient evidence supported the jury's findings that plaintiff had not concealed material facts in his insurance application, that there was no damage prior to the issuance of the policy, and that damage occurred while the policy was in effect. Before applying for the policy, plaintiff had been apprised of ground destabilization and had made claims against several governmental agencies. In plaintiff's application for the property insurance, it was reported that there

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*Judge of the Municipal Court for the Long Beach Judicial District sitting under assignment by the Chairperson of the Judicial Council.

were "no losses prior to the application." Although defendant asserted that it would not have insured plaintiff had it known of cracks in his pavement, a jury is not required to believe the post mortem testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed. Moreover, there was evidence that plaintiff had advised defendant's agent of the cracks and that the agent was not concerned. Also, there was evidence that the agent, not plaintiff, had completed the application form, and there were reports that the damage occurred while the policy was in effect.

[See **Cal.Jur.3d,** Insurance Contracts and Coverage, § 193.]

(2) **Insurance Contracts and Coverage § 36—Avoidance of Policy—Misrepresentation and Nondisclosure by Insured.**—A material misrepresentation or concealment of material facts is a proper basis for the rescission of a policy of insurance.

(3) **Appellate Review § 149—Scope of Review—Sufficiency of Evidence—Power of Court.**— When the sufficiency of evidence is challenged on appeal, the scope of the appellate court's power of review is to ascertain whether there is substantial evidence to support the finding below. When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact.

(4) **Appellate Review § 129—Scope of Review—Findings of Jury.**—The findings of a jury

must be given a liberal construction to the end of supporting a judgment.

(5) **Insurance Contracts and Coverage § 132—Actions—Questions of Law and Fact—Occurrence of Appreciable Damage.**—In actions concerning insurance coverage, the question of when appreciable damage occurs to place one on notice of a potentially insured loss is a factual matter for the trier of fact.

(6a, 6b) **Evidence § 82—Opinion Evidence—Expert Witnesses—Qualifications—Witnesses Testifying in Insurance Coverage Action.**—In an insured's action against a property insurer arising from defendant's denial of a claim, the record established that two expert witnesses possessed sufficient skill or expertise such that their testimony on insurance matters would be likely to assist the jury. Thus, the trial court did not abuse its discretion in permitting them to testify. The first expert attended two well-known universities and earned both B.A. and M.B.A. degrees with concentration in finance and insurance, graduated first in his class, and was the recipient of several honors while in college. He spent his life's work in the insurance field in many capacities, from chartered property and casualty underwriter to lecturer in insurance, business, law, and economics at the university level. The second expert was an attorney who had spent 23 years specializing in insurance and numerous years advising insurance companies regarding legal claims.

[See 1 **Witkin,** Cal. Evidence (3d ed. 1986) § 475.]

(7) **Evidence § 85—Opinion Evidence—Expert Witnesses—Hypothetical Questions.**—An expert witness may give his or her opinion based upon facts the witness has not personally observed but which are put to him or her in the form of hypothetical questions. The value of any opinion of an expert depends upon the reliability of the source of the facts assumed.

(8) **Evidence § 82—Opinion Evidence—Expert Witnesses—Qualifications—Discretion of Court.**— The qualification of an expert witness is within the sound discretion of the court and its ruling will not be disturbed in the absence of clear abuse. Indeed, the exclusion of admissible expert testimony may constitute reversible error.

(9) **Witnesses § 10—Expert Witnesses—Impeachment of Expert's Assumptions by Rebuttal Lay Witness.**—In an insured's action against a property insurer arising from defendant's denial of a claim of damage caused by ground movement, the trial court did not err in permitting a geologist to testify on plaintiff's behalf. The geologist was called as a lay witness for the purpose of impeaching certain assumptions held by defendant's expert witness regarding the geologist's conclusions. The court specifically directed that the geologist was not going to express an opinion, but to answer whether he had reached a certain conclusion. The record reflected that the questions were put to the witness as directed by the court and his answers were all either "yes" or "no."

(10) **Appellate Review § 39—Presenting and Preserving Questions in Trial Court—Evidence—Waiver of Appeal by Failure to Object.**—A party who wishes to raise the admission of inadmissible evidence as a point of error on appeal must object at the trial, stating specifically the grounds of the objection and directing the objection to the particular evidence the party seeks to exclude. A failure to object waives the defect. Thus, in an insured's action against a property insurer arising from the insurer's denial of a claim, even if there were valid grounds at trial for objecting to the testimony of a certain witness, the insurer failed to preserve it for appeal by making a timely and specific objection.

(11) **Appellate Review § 47—Presenting and Preserving Questions in Trial Court—Conduct of Counsel.**—On appeal of an adverse judgment in an insurance coverage action, defendant insurer was precluded from raising the issue of alleged misconduct on the part of plaintiff's counsel. A claim of attorney misconduct will not be considered on appeal unless there is demonstrated in the record a timely and proper objection coupled with a request that the jury be admonished. Since the adverse effect of misconduct can generally be cured by an admonition or instruction to the jury to disregard it, it is essential that the trial court be given, by proper objection, an opportunity to act. Defendant failed adequately to object at trial and therefore waived review of the alleged misconduct on appeal. Moreover, a judgment will not be disturbed on appeal on the basis of attorney misconduct unless, from the entire record, it appears that the misconduct resulted

in a miscarriage of justice. Although the case was aggressively litigated, defendant failed to demonstrate instances in the record in which the nature and seriousness of any remarks or misconduct by plaintiff's counsel established the requisite prejudice.

(12) **Mandamus and Prohibition §27—To Courts—Binding Effect of Issuance of Writ.**—In an action arising from an insurer's denial of an insured's claim, the trial court did not err in reinstating a cause of action for statutory violations (Ins. Code. § 790.03) that the law and motion judge had earlier dismissed. After the cause of action was dismissed, plaintiff sought a writ of mandate from the Court of Appeal. That court ordered issuance of a writ of mandate directing the trial court to reinstate the cause of action. Thus, the trial court was duty bound to reinstate the statutory cause of action.

(13) **Insurance Contracts and Coverage § 133—Actions—Instructions—Insurer's Fiduciary Duty.**—In an action arising from an insurer's denial of an insured's claim, the trial court's error in instructing the jury on an insurer's fiduciary duty was harmless. It was true that several appellate courts, subsequent to trial of the present matter, had held that an insurer is not a fiduciary of its insured. Assuming those cases required a finding that the instruction was erroneous, defendant insurer suffered no prejudice. The only description of a fiduciary set forth in the instructions was a statement that an insurer may not put its own interest above that of the insured. That instruction was a correct statement and did not impose a higher standard on defendant

than that actually imposed by law. Also, although the instructions placed the burden on defendant to show that it had not breached any fiduciary duty, the special verdict form established that the jury found defendant liable and awarded extracontractual damages on theories of breach of the duty to deal in good faith, commission of unfair and deceptive acts, and breach of fiduciary duty. Since the insurer's obligation was properly defined, little harm could have been done by shifting the burden of proof on that one cause of action.

(14) **Insurance Contracts and Coverage § 129—Actions—Evidence—To Support Findings—Insurer's Bad Faith.**—In an action arising from an insurer's denial of a claim for injury to property caused by destabilization of land, substantial evidence supported the jury's award of compensatory and exemplary damages arising from defendant's breach of the duty to deal reasonably and in good faith with plaintiff. Although defendant had denied the claim on the ground that plaintiff had concealed previous losses, the evidence established that the injury to plaintiff's property occurred during the period the insurance policy was in effect. When applying for the insurance, plaintiff had advised defendant's agent of cracks on the property, and the agent told plaintiff that the proximity of the property to a nearby landslide was not a problem. Also, the internal records of defendant showed that it was aware of the slide area, that defendant's parent company insured other property in the same locality, and that underwriters had the opportunity to inspect plaintiff's property. The evidence also indicated that

someone other than plaintiff had indicated that there had been "no previous losses" on the policy application. Further, there was expert testimony as to the time period during which the ground movement reached the area where plaintiff's home was located. Finally, evidence that defendant did not consult a known expert indicated bad faith.

(15a, 15b) **Insurance Contracts and Coverage § 138—Actions—Punitive Damages—Wrongful Denial of Claim.**—In an action arising from an insurer's denial of a claim for injury to property caused by destabilization of land, the trial court did not err in submitting the issue of punitive damages to the jury, even though plaintiff did not plead and prove a cause of action for fraud. Civ. Code, § 3294, subd. (a), permits an award of punitive damages where there has been malice, fraud, or oppression. The term "fraud," as defined in Civ. Code, § 3294, subd. (c)(3), is not a codification of the tort of fraud. The jury considered the cause of action pleaded for violation of Ins. Code, § 790.03 (unfair or deceptive acts or practices), and concluded that there was no "malice" or "oppression" but that defendant was "guilty" of fraud. Thus, it was not necessary for plaintiff to plead and prove a fraud cause of action.

(16) **Damages § 22—Exemplary or Punitive Damages—Ex Delicto Action: Words, Phrases, and Maxims—Ex Delicto Action.**—Where an action is ex delicto in nature, exemplary damages are properly awardable. An action is ex delicto if it arises out of fault, misconduct, or malfeasance and includes

the wrongful taking of a person's property or injury to it.

(17a-17d) **Insurance Contracts and Coverage § 121—Subrogation—Insurer That Improperly Denied Insured's Claim.**—An insurer that unreasonably and in bad faith denied an insured's claim for injury to property was not entitled to assert subrogation rights after the insured successfully sued and recovered from a third party tortfeasor. The general rule is that an insurer is subrogated in an amount equivalent to that which it has paid. Until the insurer has paid the claim under the policy, no rights accrue to it. Since the insurer made no payment on the claim, no subrogation rights arose. Moreover, the language of the insurance contract's assignment clause could be reasonably interpreted to provide that payment of benefits for a loss covered under the policy was a condition precedent to the insurer's right to require the insured to execute documents of assignment of rights against the tortfeasor. The insurer failed to properly assert its contractual subrogation rights by unreasonably denying the claim, failing to offer assistance in the insured's claim against the third party, and failing to take affirmative steps to protect its interests in the third party action. Further, in light of the insurer's nonpayment of the claim and the jury's determination of the insurer's bad faith dealing, no subrogation rights arose under equitable principles.

(18) **Insurance Contracts and Coverage § 121—Subrogation—Definition: Words, Phrases, and Maxims—Subrogation.**—Subrogation is the

right of an insurer to substitute itself in place of its insured to seek recovery from the legally responsible third party tortfeasor for loss paid by the insurer to the insured. That is to say, an insurer, upon paying a loss, is subrogated in a corresponding amount to the insured's right of legal action against any other person whose tortious action has caused the loss.

(19) **Subrogation § 1—Source of Right.**—The right to subrogation arises by contract and upon equitable principles.

(20) **Insurance Contracts and Coverage § 34—Avoidance of Policy—Failure to Comply With Terms.**—It is basic that when the insurer and insured accept the policy, each accepts the conditions imposed by the terms of the policy. If one party fails in some substantial respect to comply with the terms, that party cannot, in the absence of waiver, demand performance by the other.

COUNSEL

Haight, Brown & Bonesteel, Roy G. Weatherup, Michael J. Leahy, Rita Gunasekaran and Christopher P. Yuhl for Defendant and Appellant.

Berger & Norton, Michael M. Berger and Ann E. Kelly for Plaintiff and Respondent.

OPINION

DUNN, J.* —Defendant Standard Fire Insurance Company (hereinafter Standard) appeals from the judgment of October 31, 1989, and from an order of December 19, 1989.

FACTS

Frank Burnaby is the owner of a home located in the Big Rock Mesa area of Malibu, California, which he purchased in October 1979. Burnaby purchased two homeowner's insurance policies from Standard which had effective dates of November 28, 1981, to November 28, 1982, and December 20, 1983, to December 20, 1984, the latter having a $160,000 policy limit for the dwelling and $16,000 for other structures on his property. The policy contained a subrogation clause which provided that the insurer had the right to require an assignment of rights for recovery for a loss to the extent that payment has been made by the company.

Burnaby leased the home to a tenant from June 1982 to June 1983. There was no insurance coverage on the property from November 28, 1982, to December 20, 1983.

On September 9, 1983, the County of Los Angeles sent notices to certain homeowners in the Big Rock Mesa area warning that the county had detected significant evidence that a landslide was developing in the area and advising of a public meeting on September 19, 1983. Burnaby, who did not receive a notice of the meeting, learned of it from a neighbor and attended. At the meeting,

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*Judge of the Municipal Court for the Long Beach Judicial District sitting under assignment by the Chairperson of the Judicial Council.

there was a map indicating the tentative boundaries of the landslide and Burnaby learned that his home was outside of those boundaries. Subsequent to this meeting on December 19, 1983, Burnaby followed the advice he ascertained had been given to neighbors and submitted claims to the County of Los Angeles and other governmental agencies asserting that his house had been damaged in the amount of $1.1 million. He indicated the damage had commenced on or about September 19, 1983, and was continuing. He also made claims against the Flood Control District, the State of California and the Coastal Commission.

Subsequently, Burnaby purchased through his insurance agent, Richard Poast, a Standard homeowner's policy covering the period December 20, 1983, to December 20, 1984. Poast filled out the application for insurance for Burnaby and checked the box "no losses prior to the application."

On May 9, 1984, Burnaby wrote to Standard's parent company, Aetna Life and Casualty, claiming property damage to his home due to destabilization of land resulting in a progressive and continuing landslide. Burnaby gave to the insurance company three statements under oath.

Standard did its investigation of Burnaby's claim and on August 7, 1985, by letter from Attorney Jay Robinson, denied Burnaby's claim. Burnaby subsequently filed his complaint for damages. Although Burnaby's complaint alleged six causes of action, by the time of commencement of trial, there remained only causes of action for breach of contract, breach of the covenant of good faith and fair dealing and breach of fiduciary duty. Prior to trial, the cause of action for violation of section 790.03 of the Insurance Code had been eliminated by a favorable ruling

on Standard's motion for summary adjudication.[1] At the same time, the court had ruled that Burnaby's claim for damages under the 1981-1982 policy of insurance was time barred by the applicable one-year statute of limitations, consequently, no coverage existed under that policy.

Standard contended at the trial, which commenced August 21, 1989, that the damage to Burnaby's property had commenced before December 20, 1983, the effective date of his policy of insurance, and that Burnaby, at the time he applied for the policy, had misrepresented to or concealed from Standard significant facts concerning the condition of his property.

Three weeks into the trial, on September 13, 1989, Division Seven of this court issued its order staying the trial until October 1, 1989, and notifying the trial court and parties that the court was considering a peremptory writ of mandate and directing Standard, as real party in interest, to file its opposition to the petition. On September 25, 1989, this court issued its order that the trial court reinstate the cause of action based upon breach of Insurance Code section 790.03, subdivision (h) or, alternatively, show cause why the cause of action should not be reinstated. On September 29, the trial court reinstated the cause of action and the trial resumed on October 2, 1989.

The jury returned a special verdict on October 27, 1989, finding that Standard had breached the terms of the insurance contract and had acted in bad faith in doing so. The jury awarded damages and prejudgment interest in the

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[1]At law and motion, the court ruled that the case of *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 [250 Cal.Rptr. 116, 758 P.2d 58], mandated dismissal of this cause of action.

sum of $235,990.86 and extracontractual damages in the amount of $600,000. On October 31, 1989, the jury returned its verdict awarding $500,000 as punitive damages. The jury answered a series of questions in rendering its verdict which included the following findings: that Burnaby had not concealed from Standard any material fact he had a duty to disclose; that Standard did not properly deny Burnaby's claim by virtue of the latter's concealment of material facts in his policy application; that the property damage to Burnaby's house first occurred between December 20, 1983, and December 20, 1984, and not prior thereto; that such damage was an unanticipated fortuitous external event; that Standard breached its duty to Burnaby to deal fairly and in good faith and breached the fiduciary duty it owed to Burnaby; that Standard knowingly committed one or more of the unfair and deceptive practices prohibited by Insurance Code section 790.03; and, that Standard was "guilty" (*sic*) of fraud but was "not guilty" (*sic*) of malice or oppression.

Standard's motion for a new trial was granted on the basis of excessive compensatory damages and provided that the motion would be denied if Burnaby consented to a reduction in the amount of such damages from $600,000 to $200,000. Burnaby consented and judgment was entered in the total sum of $1,014,990.31, including interest, costs and disbursements.

Standard timely appealed from the judgment and Burnaby appealed from the conditional order for a new trial.[2]

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[2]Burnaby has abandoned his appeal.

Subsequent to the entry of the jury verdict, Standard filed a motion to amend the judgment to provide for Standard's right of subrogation.[3] On December 19, 1989, that motion was denied on the rationale that any subrogation rights were forfeited when Standard breached the contract and acted in bad faith.

DISCUSSION

I

(1a) Standard's first contention is that there was no insurance coverage for the loss suffered by Burnaby. Standard's argument is that Burnaby's loss is due to earth movement which occurred no later than December 19, 1983. It urges that is contention is borne out by the sworn statements of Burnaby in his loss claim submitted to the government entities. In those statements, Burnaby's claim is that his home was a total loss and that there were cracks in his driveway. Accordingly, urges Standard, the date of loss, for insurance purposes, was in 1983 when Burnaby was without insurance coverage. Standard exhorts this court to so rule "as a matter of law," thus, negating the jury's verdict awarding general and punitive damages to Burnaby. Standard importunes us to, in the alternative, "correct the error of the jury" and determine as a matter of law that the insurance policy should be rescinded due to misrepresentation and concealment by Burnaby on the application for the policy. Specifically, avers Standard, the application did not reveal that Burnaby had made the claim of loss to the

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[3]The record reflects that certain governmental entities posted a substantial sum of money to be divided among the Big Rock Mesa claimants, including Burnaby. The record does not indicate the amount, if any, which Burnaby actually received.

government and stated affirmatively that there had been "no losses" within the preceding three years when in fact, there had been cracks in the earth around Burnaby's property. Standard points us to *Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169 [243 Cal.Rptr. 639], as authority for his stance.

Sogomonian is a case in which the court ruled that the trial court should have entered an order granting summary adjudication of issues establishing that the insurer was entitled to rescission of a policy of insurance on the grounds of concealment and misrepresentation. The case before this court, however, is factually and procedurally very different. In *Sogomonian*, the issue before the court was propriety of a summary judgment ruling as to undisputed facts. This case was before the court for determination of factual matters in a trial. In *Sogomonian*, there was no factual dispute regarding concealment of various material facts by the insured such as subsidence and earth movement which culminated in a landslide onto the property of a downhill neighbor. In the case before the bar, a principal factual issue tried to the jury was whether or not there had been concealment by Burnaby of material facts from the insurer regarding earth subsidence and movement and Burnaby's knowledge thereof. *Sogomonian* is, accordingly, inapposite.

(2) It is well established that material misrepresentation or concealment of material facts such as those recited herein is a proper basis for the rescission of a policy of insurance. (See *Cohen v. Penn Mut. Life Ins. Co.* (1957) 48 Cal.2d 720, 727 [312 P.2d 241].) **(1b)** In this case, however, the jury, after listening to protracted conflicting testimony, made specific factual findings that Burnaby had not

concealed material facts; that his home had not been damaged by earth movement prior to the issuance of the homeowner's insurance policy; and that the damage did occur during the time period that the policy was in force. (3) The scope of the power of review of this court is to ascertain whether there is substantial evidence to support the finding of the jury. "When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. [Citations.]" (*Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784-785 [59 Cal.Rptr. 141, 427 P.2d 805].)

(1c) In this case, there is substantial evidence to support the jury verdict. For example, evidence was presented to the jury that when Burnaby first inquired about insurance, he advised Standard's agent, Poast, that there were some cracks on his property which were located near the Big Rock Mesa slide area. Evidence was presented that Poast was not concerned because he assumed that landslides were not covered in the policy. In addition, evidence was presented that Aetna, the parent of Standard, knew about and was investigating the landslide before Burnaby's homeowner's policy was issued. Moreover, evidence was presented that Burnaby never saw an insurance application, that the "no losses" box on the application was unanswered when submitted to the insurance company by Poast and an underwriter checked the "no losses" box on the application after she received it from agent Poast. Further, the jury was presented evidence that Standard had a previous policy file from 1978 to 1981; had an inspection report for 1982 on the Burnaby home which was prepared by Standard's investigator; and that the home was not damaged by the Big Rock Mesa slide before the policy was issued. Uncontro-

verted testimony was presented to the jury by an expert witness that the landslide manifested itself in the area of Burnaby's home in 1984 and that the cracks in the driveway were probably caused by tree roots. As to the government claim letter and the claims file, Burnaby presented a reasonable and plausible explanation to the jury.

(4) It is well established that the findings of a jury must be given a liberal construction to the end of supporting a judgment. (*Snapp v. State Farm Fire & Cas. Co.* (1962) 206 Cal.App.2d 827, 831 [24 Cal.Rptr. 44].) **(5)** Also, it is established that the question of when appreciable damage occurs to place one on notice of a potentially insured loss is a factual matter for the trier of fact. (*Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 687 [274 Cal.Rptr. 387, 798 P,2d 1230]; *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co.* (1991) 227 Cal.App.3d 1314, 1318 [278 Cal.Rptr. 301].) **(1d)** Standard asserted it would not have issued a policy of insurance to Burnaby if it had known about the cracks in his home. The obvious answer to such an assertion is that the jury determined there was no misrepresentation or concealment. "[A jury] is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed. [Citation.]" (*Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 916 [109 Cal.Rptr. 473, 513 P.2d 353].) We are unable to say that the trier of fact in this case indulged in any unreasonable inferences which were unsupported or rebutted by clear, positive and uncontradicted evidence so that its factual findings may not stand.

II

Standard argues that inadmissible prejudicial evidence led to the adverse verdict. In point of fact, Standard says that Richard Leabow, "a purported expert witness," should not have been permitted to testify that it was improper to deny a claim on the basis of nondisclosure of cracks because Leabow was not experienced in and had no knowledge of underwriting. Standard states twice in its opening brief that Leabow and "purported legal expert" Kenneth Chiate were permitted to testify "to the requirements of the law. Neither . . . was qualified to tell the jury that an insurance company must pay a claim if only 20% of the evidence favors a finding of coverage." And again, "[t]he most interesting, and bizarre, testimony of Mr. Leabow dealt with the duty of an insurer to pay a claim. . . . In quantitative terms, a claim should be paid even if 80% of the evidence supports its denial. [Citation.]" Having perused the record carefully, this court is perturbed that Standard should so glaringly misstate the testimony of these two witnesses. The essence of Leabow's testimony *on cross-examination* follows:

"Q. . . . . .

"If . . . the evidence showing lack of coverage appears to be stronger than the evidence showing coverage, do you think an insurer is entitled to deny that claim?

"A. . . . there would have to be a great preponderance of evidence in favor of there being no coverage before you would deny your insured the benefit.

". . . . . .

"Q. . . . does it have to be 90 to 10, or what percentage would you say?

"A. . . . I am not an expert to, you know, to make that determination.

". . . . . .

"Q. How preponderant in your opinion does lack of coverage have to be in order to properly deny a claim where there are dispute[]d facts respecting coverage?

". . . . . .

"A. If the evidence lends itself clearly to percentages, I might suggest something like 80/20.

"I don't think most evidence lends itself to that type of analysis."

Later in cross-examination, in answer to the same question, Leabow stated: "I couldn't give you a percentage. . . . [¶] [I]f they were out looking for facts to deny the claim and they built 80 percent of the facts in their favor and disregarded the information that was available to support the claim, then I would say 80 percent wasn't enough because they haven't done the right investigation."

(6a) Leabow testified to his qualifications at length. He attended Harvard University and UCLA and earned both B.A. and M.B.A. degrees with concentration in finance and insurance. He graduated first in his class and was the recipient of several honors while in college, including being a Ford Foundation Fellow. Leabow spent his life's work in the insurance field in many capacities, from chartered property and casualty underwriter to lecturer in insurance, business, law and economics at the university level. As the trial judge said in a sidebar colloquy: "He's a competent guy." Attorney Chiate's qualifications may be summed up by restating his testimony that he had spent 23 years

specializing in insurance and numerous years advising insurance companies regarding legal claims.

(7) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) It is well established that an expert may give his opinion based upon facts he has not personally observed but which are put to him in the form of hypothetical questions. The value of any opinion of an expert depends, of course, upon the reliability of the source of the facts assumed. (See Evid. Code, § 801.) (8) The qualification of an expert witness is within the sound discretion of the court and its ruling will not be disturbed in the absence of clear abuse. (*Chadock v. Cohn* (1979) 96 Cal.App.3d 205, 208 [157 Cal.Rptr. 640].) And, indeed, the exclusion of admissible expert testimony may constitute reversible error. (See *Lunghi v. Clark Equipment Co.* (1984) 153 Cal.App.3d 485, 490 [200 Cal.Rptr. 387].)

(6b) The determinative issue in this case is whether the two witnesses possessed sufficient skill or experience in the fields of their testimony so that the testimony would be likely to assist the jury in its search for truth. (*Brown v. Colm* (1974) 11 Cal.3d 639, 645 [114 Cal.Rptr. 128, 522 P.2d 688].) We hold that the record establishes that Leabow had sufficient education and experience that there was no abuse of discretion by the court in permitting his testimony. The same is true as regards Chiate. The weight to be given the testimony of each is, of certainty, within the province of the jury.

III

(9) Standard complains that Dennis Evans, a geologist, was not designated as an expert witness yet was permitted to give expert testimony over Standard's objection and in this regard, the trial court erred. Counsel for Burnaby has not made any effort to respond to this contention in even the most cursory fashion, thus, necessitating a search of the record by this court. Our perusal reveals that counsel for Standard has again mischaracterized the testimony of the witness as well as its significance. It appears that Evans was called as a lay witness for the purpose of impeaching, pursuant to Code of Civil Procedure section 2034, subdivision (m),[4] certain assumptions held by Standard's expert witness, Janice Ramsay, regarding Evans's conclusions. The court specifically directed that "[Mr. Evans is] not going to express an opinion. [¶] He's going to be asked if he reached a certain conclusion, yes or no." The record reflects that the questions were put to the witness as directed by the court and his answers were all either "yes" or "no." We find no error.

(10) Standard further urges that it was error "to allow attorney Marlena Mouser . . . to testify concerning an alleged statement by Mr. Richard Poast to her." It argues the testimony was not impeachment testimony, was clearly

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[4]Code of Civil Procedure section 2034, subdivision (m), reads in pertinent part: "A party may call as a witness at trial an expert not previously designated by that party if: . . . (2) that expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion."

hearsay and lacked foundation. Standard does not cite this court to any objection reflected in the record which was made on any of those three grounds. This court's search of the record reveals no such objections. It is elementary that where inadmissible evidence is offered, the party who wishes to raise the admission as a point of error on appeal must object at the trial stating specifically the grounds of the objection and directing the objection to the particular evidence the party seeks to exclude. A failure to object waives the defect. (See *Haskell v. Carli* (1987) 195 Cal.App.3d 124, 129 [240 Cal.Rptr. 439]; *Estate of Silverstein* (1984) 159 Cal.App.3d 221, 225 [205 Cal.Rptr. 294].) It follows that even if there were valid grounds at trial for objecting to the testimony of attorney Mouser, which issue we do not reach, Standard failed to preserve it for appeal by making a timely and specific objection.

IV

(11) Standard contends that Burnaby's attorney engaged in conduct and made comments during the trial and at final argument which were prejudicial to Standard's case. It points to the allegedly improper placement of enlargements before the jury, to questions characterized as "argumentative" and to comments to the jury at closing to the effect that the insurance company had destroyed evidence and language which Standard asserts implied that insurance companies generally do not pay claims.

It is elementary that a claim of attorney misconduct will not be considered on appeal unless there is demonstrated in the record a timely and proper objection coupled with a request that the jury be admonished. (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318 [74 Cal.Rptr. 534, 449 P.2d 750]; *Menasco v. Snyder* (1984) 157 Cal.App.3d 729,

732 [203 Cal.Rptr. 748].) Standard, here, has made no such showing. Inasmuch as the adverse effect of misconduct can generally be emasculated by an admonition and/or instruction to the jury to disregard it, it is essential that the trial court be given, by proper objection, an opportunity to act. Failure to do so waives review of the alleged misconduct on appeal. Our own review of the instant record reveals zealous and aggressive conduct by both sides, rather than prejudicial misconduct. Standard's counsel, who raises the issue of attorney misconduct, did, himself, assert in closing argument that Burnaby had committed perjury and indicated that one of Burnaby's expert witnesses was "a professional witness" whose "livelihood is . . . trying to hoodwink people. . . . "

It is also axiomatic that a judgment will not be disturbed on appeal on the basis of attorney misconduct unless, from the entire record, it appears that the misconduct resulted in a miscarriage of justice. (*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 157 [119 Cal.Rptr. 245.] Standard has not pointed us to instances in the record and our independent perusal has not revealed any situations in which the nature and seriousness of any remarks or misconduct establish the requisite prejudice. We note that this was a lengthy trial which was aggressively litigated by both sides. An experienced and capable trial judge fairly, impartially and competently controlled the proceedings. We cannot say from our search of this record that there was misconduct, and if there was, that it rose to the level that but for that conduct, a different result would have been probable. We, therefore, hold to be meritless Standard's claim that prejudice resulted from attorney misconduct.

V

(12) Standard claims that the "interruption of the defense" by a stay order and alternative writ from the Court of Appeal was "gravely prejudicial." It argues that, "[c]learly, the trial judge had no jurisdiction to overturn the ruling made by the earlier judge. [Citations.] Rather, the proper remedy of the plaintiff was to appeal from the judgment after trial." Standard argues further that the decisions are in conflict as to whether there exists a cause of action for violation of Insurance Code section 790.03, hence, "[n]onetheless, when one judge has made an order granting summary adjudication of an issue, no other judge has jurisdiction to disturb that order except upon a later appeal after trial . . . ," citing *Conway v. Bughouse, Inc.* (1980) 105 Cal.App.3d 194, 202-203 [164 Cal.Rptr. 585].

Standard's argument addresses the reinstatement on September 19, 1989, of a cause of action for violation of the Unfair Practices Act, Insurance Code section 790.03. The cause of action had been dismissed at law and motion and a later request for reconsideration of the dismissal had been denied. Burnaby sought reinstatement by writ of mandate and on September 25, 1989, an alternative writ was granted ordering reinstatement of the cause of action by the trial court or a showing of why it should not be reinstated. Apparently, Standard's argument is that the trial court, notwithstanding the writ issued to it by this court, was without jurisdiction to reinstate the previously dismissed cause of action and by doing so committed reversible error. In other words, a pretrial error may not be corrected by means of an extraordinary writ. An argument which urges that a case be tried with a known reversible error in place defies logic and is unmeritorious. The trial

judge is duty bound to follow the directive of the appellate court. Moreover, the case cited by Standard for the principle it espouses, *Conway v. Bughouse, Inc., supra*, 105 Cal.App.3d 194, is not authority for that principle. Quite the contrary. "In any case, . . . the party who feels that an injustice has been done by the granting of a partial summary judgment . . . may petition for a writ of mandate. . . ." (*Id.*, at p. 203.) Clearly, the trial court acted properly in following the directive of the appellate court.

VI

(13) Standard claims "the trial court prejudicially erred in submitting the case to the jury on the theory of breach of fiduciary duty." We disagree.

As noted by the trial court and conceded by Standard during a colloquy on jury instructions, at the time this case tried, "a lot of dicta" existed which at least implied that an insurance company stands in a fiduciary relationship with its insured. (See e.g., *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 768 [206 Cal.Rptr. 354, 686 P.2d 1158].) In accordance with such dicta, Burnaby proposed four special jury instructions on the subject of fiduciary duty. The trial court modified the proposed instructions in several respects and, as modified, read these instructions to the jury over Standard's objection.[5]

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[5]As given to the jury, the instructions read as follows:

"Another reason Mr. Burnaby seeks benefits from Standard Fire is breach of the fiduciary duties owed by Standard Fire and its agent to its insured."

"An insurance company is a supplier of a vital public service. As a supplier of a public service the obligations of insurers go beyond

(continued...)

As noted by Standard in its opening brief, since the time of trial, several appellate cases have specifically held that an insurer is not a fiduciary of its insured. (See, e.g., *Thompson v. Cannon* (1990) 224 Cal.App.3d 1413[,] 1418 [274 Cal.Rptr. 608]; *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148-1149 [271 Cal.Rptr. 246].) However, even assuming that such cases require that we deem the instructions under review to have been error, Standard has not suffered any prejudice which requires that it be accorded relief on appeal. (See *Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 489 [227 Cal.Rptr. 465].)

The only actual description of a fiduciary set forth in the instructions is the proviso that an insurance company "may not put its own interest above that of the insured's interest." This, however, is clearly a proper statement of law. (See, e.g., 182 Cal.App.3d at p. 489 citing *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818-819 [169 Cal.Rptr. 691, 620 P.2d 141].) Thus, although it may have been error to instruct that Standard was a "fiduciary,"

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[5](...continued)
meeting reasonable expectations of coverage and encompass the responsibilities of a fiduciary."

"A fiduciary owes loyalty and good faith to those who repose trust and confidence in it. [¶] As a fiduciary, an insurance company may not put its own interest above that of the insured's interest."

"Because of the existence of the fiduciary relationship between Mr. Burnaby and Standard Fire, the burden of proof relating to the cause of action of breach of fiduciary duty partially shifts so that Standard Fire has the burden of proving by a preponderance of the evidence that it did not breach its fiduciary duties owed to Mr. Burnaby. This shift in the burden of proof applies only to the cause of action for breach of fiduciary duty and does not apply to the determination of damages.

no prejudice resulted because the jury was not told that Standard should be held to a higher standard than the one actually imposed by law.

The final instruction placed the burden on Standard to prove that it did not breach any fiduciary duties to Burnaby, and specified that the shift in burden did not apply to other causes of action or to the determination of damages. However, the special verdict form establishes that the jury found Standard liable and awarded extracontractual damages on theories of breach of the duty to deal in good faith, commission of unfair and deceptive acts, and breach of fiduciary duty. Because, as discussed above, an insurance company's obligation was properly defined, we see little harm that could have been done by shifting the burden of proof on that one cause of action.

VII

(14) We turn to the issue of whether there was substantial evidence to uphold the jury award of damages in the context of examining Standard's argument that its denial of Burnaby's claim of loss was reasonable and, therefore, the award of damages was improper. We summarize the substantial evidence which was before the jury to support its finding of a bad faith breach of duty to deal reasonably and in good faith with Burnaby rendering Standard liable for compensatory and exemplary damages.

Evidence was presented that in 1983, Burnaby's house was not a part of the Big Rock Mesa slide area which was slow moving and progressive. In December 1983, when he applied for hazard insurance, Burnaby advised Standard's agent, Poast, that his home was near the landslide and that there were cracks on his property. Poast told Burnaby that his proximity to the slide was not a

problem. Although at trial, Poast testified he was unaware of the landslide problems, the internal records of Standard revealed that Gus Pelligrino, the insurance company property specialist, had determined in May 1985 that Poast said he did know about the landslide when the policy was applied for. Also before the jury was testimony that the parent insurance company, Aetna, had 13 other insureds in the slide area. Moreover, before the policy was issued, an Aetna underwriter had called Poast for cross streets so that he could inspect the property. The jury heard testimony that Burnaby had never seen an application for insurance. The application was filled out by Poast and submitted to the insurance company with the question box regarding "no losses" left blank. Ramirez, an Aetna underwriter, who inexplicably had two applications, checked the "no losses" box herself after she received the application from Poast. Also, there was no question on the application regarding whether other claims had been made. In addition, the jury heard evidence that Burnaby previously had hazard insurance with Standard which he had not renewed for a period when the property was occupied by lessees.

The jury had before it evidence from the county improvement district geologic expert, Dennis Evans, as well as Dr. Atwar Singh, another expert, that it was not until 1984 that the landslide expanded westward to the area where Burnaby's home was located. Moreover, the jury had before it evidence that Standard's own expert, Frederich Gebhardt of Leighton and Associates, advised Standard to the same effect in its report to Standard and in addition, advised that the cracks at Burnaby's property were not caused by the landslide and that they, the experts, were unable to determine if Burnaby's property had suffered any landslide damages before the policy was issued. Regarding

the investigation of Burnaby's claim of loss, evidence was presented that Robert Donnelly, the insurance claims investigator who first investigated the claim, reported to Standard on August 10, 1984, that the loss of Burnaby's property was a "delayed reaction" to the slide to the east of Burnaby's property and the repairs would exceed the policy limits. The claim was then reassigned to Donnelly's supervisor, Pelligrino, whose report to the insurance company was that the company might be able to compromise the claim if they received a favorable geologic report from Leighton and Associates. He set the estimated settlement value at $80,000. Evidence was presented to the jury that in April 1985, Pelligrino's report indicated that Leighton and Associates could not determine a date when Burnaby's loss manifested. The jury heard evidence that Pelligrino, on September 24, 1984, sent a notice to his superior, George Spilios, the claims department manager, showing Burnaby's loss date as December 20, 1983, but sent a letter one week later to Burnaby's attorney indicating the company was of the opinion the loss date was September 10, 1983, a date outside of the insurance policy period. The jury heard the testimony of Standard's insurance expert, Bernard Feldman, to the effect that if the insurance company knew of an expert, Dennis Evans, and of his extensive information regarding the landslide, it would be bad faith not to contact and talk to him. The jury further heard Standard's attorney, Jay Robinson, describe Evans as "a geotechnic expert who probably has more knowledge about Big Rock than any of the other experts. . . ." Evidence was presented that Standard did not contact Evans although Standard knew about him and although he was available to Standard and had been contacted by other insurers. The evidence of these

facts is a sufficient underpinning, we hold, in support of the award by the jury of damages.

VIII

(15a) Standard argues that "it was manifest error for the trial judge to submit the claim for punitive damages on a fraud theory to the jury" because it was based upon a jury finding of the tort of fraud. Standard argues that Civil Code section 3294, subdivision (e), is a codification of the common law tort of fraud which was not pleaded by Standard, hence, no judgment could be returned on that theory. Although novel, Standard's argument is specious. First, Standard does not point this court to a timely and specific objection made to any evidence presented, any jury instructions given or any argument made to the jury on this issue. On that sole basis, we need not address the issue. Nonetheless, we observe the jury verdict is not a product of improper instruction to the jury or submission to the jury on a theory of fraud. The jury considered, inter alia, the cause of action pleaded for violation of Insurance Code section 790.03. The jury concluded that there was no "malice" or "oppression" but that Standard was "guilty" of fraud. Civil Code section 3294, subdivision (a), provides for sanctions by way of exemplary damages where bad faith conduct occurs in a context of malice, fraud or oppression. (*Egan v. Mutual of Omaha Ins. Co., supra*, 24 Cal.3d at p. 820.) The term "fraud" under Civil Code section 3294, subdivision (c)(3), means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." This is not fraud in the common law tort context. It is not a codification of the tort of fraud. There

is no necessity for Burnaby to plead and prove, as Standard asserts, all of the elements of a tort cause of action for fraud, including detrimental reliance.

(16) Where an action is ex delicto in nature, exemplary damages are properly awardable. An action is ex delicto if it arises out of fault, misconduct or malfeasance and includes the wrongful taking of a person's property or injury to it. (See 1A C.J.S., Actions, § 4, subd. (b), p. 309; Black's Law Dict. (5th ed. 1979) p. 509, col. 1.) **(15b)** In the case of *Haigler v. Donnelly* (1941) 18 Cal.2d 674 [117 P.2d 331], plaintiffs did not plead a cause of action in fraud. Rather, their first cause of action was a common count for money had and received and the second was for conversion. Our Supreme Court held at page 681: "Exemplary damages are properly awardable [under Civil Code section 3294] in an action for conversion, given the required showing of malice, fraud or oppression. [Citations.]" The conversion in the *Haigler* case was the withholding from plaintiffs by defendant of a sum of money claimed by defendant-broker to be a commission to which she was entitled. The evidence was sufficient, said the court, to uphold the trial court's conclusion that the defendant's refusal to account was not made in good faith and was, instead, a ploy to obtain plaintiffs' money by trickery and falsehood. Similarly, in the case of *Arzaga v. Villalba* (1890) 85 Cal. 191 [24 P. 656], a father was held to have committed the tort of conversion by refusing to return to his daughter her furniture and clothes upon her demand. Our Supreme Court held that exemplary damages were properly awarded to plaintiff in the fraud context of Civil Code section 3294. Both *Haigler* and *Arzaga, supra*, accordingly are illustrative of the principle that no cause of action for the tort of fraud need be pleaded and proved as a condition

precedent to an award of damages pursuant to Civil Code section 3294. Similarly in this case, there is ample evidence, which is reviewed hereinafter, to justify the jury award of exemplary damages on the basis of intentional misrepresentation and/or concealment of a material fact with intent to deprive respondent of property, to wit, insurance proceeds, thereby constituting fraud within the meaning of Civil Code section 3294, subdivision (a).

IX

(17a) We are called upon to determine the issue of whether an insurer who is determined at trial to have unreasonably and in bad faith declined to pay a claim of loss by its insured is entitled to assert subrogation rights after the insured has successfully sued on that claim of loss and recovered from a third party tortfeasor. We hold in the negative.

(**18**) Subrogation is the right of an insurer to substitute itself in place of its insured to seek recovery from the legally responsible third party tortfeasors for loss paid by the insurer to the insured. (*Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479, 488 [255 Cal.Rptr. 40.] That is to say, an insurer, upon paying a loss, is subrogated in a corresponding amount to the insured's right of legal action against any other person whose tortious action has caused the loss. (See 16 Couch on Insurance (2d ed. 1983) § 61:1, p. 75.)

(**17b**) In the instant case, Standard contends that it is entitled to subrogation rights by virtue of the contract of insurance between Burnaby and itself and/or by operation of law. Standard urges that if its right to subrogation is not protected, Burnaby will receive a windfall in the form of a double recovery.

(19) The right to subrogation arises by contract and upon equitable principles. (17c) In this case, the subrogation clause in the insurance policy provided that: "Any *insured* may waive in writing before a loss all rights of recovery against any person. IF NOT WAIVED, WE MAY REQUIRE AN ASSIGNMENT OF RIGHTS OF RECOVERY FOR A LOSS TO THE EXTENT THAT PAYMENT IS MADE BY US. [¶] IF AN ASSIGNMENT IS SOUGHT, ANY *INSURED* SHALL SIGN AND DELIVER ALL RELATED PAPERS AND COOPERATE WITH US IN ANY REASONABLE MANNER." (Original italics.)

The general rule is that an insurer is subrogated in an amount equivalent to that which it has paid. Until the insurer had paid the claim under the policy, no rights accrue to it. (*Hausmann v. Farmers Ins. Exchange* (1963) 213 Cal.App.2d 611, 615 [29 Cal.Rptr. 75]; see also *Patent Scaffolding Co. v. William Simpson Constr. Co.* (1967) 256 Cal.App.2d 506, 509 [64 Cal.Rptr. 187].) Thus, the right of subrogation does not arise until there has been a payment by the insurer under the policy of insurance. It is undisputed that in the instant case, no payment has been made by Standard. Moreover, the language of assignment in the contract of insurance may be reasonably interpreted to hold that payment of benefits for a loss covered under the policy is a condition precedent to the insurer requiring the execution by the insured of documents of assignment of rights against the tortfeasor. (20) It is basic that when the insurer and insured accept the policy, each accepts the conditions imposed by the terms of the policy. If one party fails in some substantial respect to comply with the terms, that party cannot, in the absence of waiver, demand performance by the other.

(17b) It is undisputed that Standard, in this case, (1) was presented a claim of loss and declined to honor it; (2) was informed and invited to participate in the prosecution of the suit against the tortfeasors; (3) provided no aid to Burnaby in his prosecution of the claim; (4) took no affirmative steps such as intervention to protect its interest; and (5) was determined by the jury to have acted unreasonably and in bad faith in denying its insured's claim of loss. Under this set of facts, we find no merit to Standard's claim that it possesses a right of contractual subrogation that may be asserted. Standard has no right, moral or equitable, to lie quiescent and require that another protect its rights. A subrogation right may be waived expressly or by implication. (*Lossman v. City of Stockton* (1935) 6 Cal.App.2d 324, 332 [44 P.2d 397].) We hold that the conduct of Standard in this instance constituted a failure to properly assert its right of subrogation in compliance with the policy of insurance thus waiving that right. On the rationale that failure to make payment is a waiver, we hold that subrogation does not apply in an instance, as here, where the insurer has refused to pay a claim of loss subsequently judicially determined to be appropriate.

Standard may not, moreover, assert a right of subrogation upon equitable principles. Although the policy of insurance determines the rights of the insurer regarding subrogation, in the absence of a contract of insurance, the right arises pro tanto upon payment. In the instant case, there was no payment. Accordingly, there is no subrogation right. (See *Karaty v. State Farm Mut. Auto. Ins. Co., supra*, 207 Cal.App.3d at pp. 488-489.) This principle is particularly applicable considering the jury determination of Standard's lack of good faith dealing. The essential underlying philosophy of subrogation is to do justice vis-a-vis the

parties by requiring payment from the person primarily responsible for the loss. (See 16 Couch on Insurance, *supra*, § 61:18, p. 93.)

In *Kardly, supra*, where an insurer's subrogation rights were held to have been lost with respect to certain of the insured's losses which were not paid, the court discussed *Powers v. Calvert Fire Ins. Co.* (1950) 216 S.C. 309 [57 S.E.2d 638] to which Burnaby refers. In that case which involved an auto collision, the insured's claim was denied by the insurer. The insured sued the alleged tortfeasor, as in this case, and terminated its suit by settlement as occurred in the instant case. The insurer, as here, took no part in the insured's action notwithstanding its subrogation rights pursuant to a clause in the policy of insurance. As in this case, the insured sued the insurer for damages for breach of the policy of insurance. On the issue of subrogation, the court observed that an insurer "cannot sit down and hold its hands and purse and thereafter escape liability for fulfillment of its contract by reason of the insured's effort, after fair notice, to recoup his loss by litigation against a wrongdoer." (*Id.*, at p. 642.) The court held that subrogation arises upon payment and in default of that is not available where there is conduct which amounts to breach of the contract of insurance inasmuch as it results in a waiver of the right of subrogation.

We observe, finally, that there has been in this case no showing of a specific sum of money paid by tortfeasors to Burnaby. The evidence makes clear there has been some pecuniary recovery by Burnaby from a third party and to that extent, perhaps, a "double recovery" in contravention of public policy. Nonetheless, by our holding in this case, we endorse the countervailing policies of good faith and

fair dealing and proper attention to and assertion of legal rights, inter alia. Accordingly, we hold the trial court properly ruled that Standard forfeited its subrogation rights given the jury determination that Standard had breached its contract of insurance with Burnaby and had engaged in tortious conduct justifying an award of exemplary damages.

X

We find the other brief contentions of Standard unmeritorious.

DISPOSITION

The judgment and the order under review are affirmed.

Ortega, Acting P.J., and Masterson, J., concurred.

B-1

No. 2/1 B047665 - S033800

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

SUPREME COURT
FILED
SEP - 2 1993
Robert Wandruff Clerk
DEPUTY

FRANK BURNABY, Respondent

v.

STANDARD FIRE INSURANCE COMPANY, Appellant

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Apellate [*sic*] Reports the opinion in the above-entitled appeal filed June 1, 1993, which appears at 16 Cal.App.4th 135. (Cal. Const., Art. VI, Section 14, rule 976, Cal. Rules of Court.)

Kennard, J. is of the view the opinion should remain published.

LUCAS

Chief Justice

APPENDIX B

C-1

FOR COURT USE ONLY

FILED
JAN 3 1990
FRANK S. ZOLIN, COUNTY CLERK
By S. WALL, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

FRANK BURNABY PLAINTIFF(S) vs ST. STANDARD FIRE INSURANCE COMPANY AND DOES 1-25 DEFENDANT(S)	CASE NUMBER WEC 089584 JUDGMENT ON SPECIAL VERDICT

The action came on reguarly for trial on August 21, 1989, in Department West P of the Superior Court, the Honorable Richard G. Harris Judge Presiding; the plaintiff(s) appearing by attorney(s)

A. Tod Hindin and
FADEM, BERGER & NORTON
by: George M. Soneff

and the defenant(s) appearing by attorney(s)

HAIGHT, BROWN & BONESTEEL
by: Christopher P. Yuhl and Roy G. Weatherup

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

(OVER)

Judgment entered pursuant to stipulation and order of court dated January 12, 1990.
Attest: FRANK S. ZOLIN, County Clerk
By: /s/ Sherry Hall, Deputy, January 12, 1990

APPENDIX C

JUDGEMENT ON SPECIAL VERDICT

(Here quote entire Special Verdict verbatim)

TITLE OF COURT AND CAUSE

(1) Did FRANK BURNABY conceal any material fact from STANDARD FIRE INSURANCE COMPANY that he had a duty to disclose to it?

Yes ✓ No ____

(2) Did defendant STANDARD FIRE INSURANCE COMPANY properly deny Mr. BURNABY'S claim and rescind the insurance policy issued to him (the policy with an effective date of December 20, 1983), by virtue of MR. BURNABY's concealment of material facts in his application for the policy?

Yes ____ No ✓

If your answer to this question is "yes," sign and return this verdict form. If it is "no," proceed to question No. 3.

(3) Did the property damage to MR. BURNABY's house for which he made claim first occur prior to December 20, 1983?

Yes ____ No ✓

If your answer to this question is "yes," sign and return this verdict form. If it is "no" proceed to question No. 4.

(4) Did the property damage to MR. BURNABY's house for which he made claim first occur between December 20, 1983 and December 20, 1984?

Yes ✓ No ____

If your answer to this question is "no," sign and return this verdict form. If it is "yes," proceed to question No. 5.

(5) Was the occurence of loss or damage to the plaintiff's property during the term of the plantiff's insurance policy an unanticipated fortuitous external event?

Yes ✓ No ____

If you answer Question No. 5 "no," sign and return the verdict. If you answer Question No. 5, "yes," Question No. 6.

(6) Did the plaintiff, FRANK BURNABY, perform the terms and conditions of the insurance contract on his part to be performed under the insurance contract which were not excused or waived?

Yes ✓ No ____

If you answer Question No. 6 "no", sign and return the verdict. If you answer Question No. 6 "yes", then answer Question No. 7.

(7) Did defendant, STANDARD FIRE INSURANCE COMPANY breach the insurance contract that is issued to the plaintiff?

Yes ✓ No ____

If you answer Question No. 7 "no", sign and return this verdict. If you answer Question No. 7 "yes", then answer Question No. 8.

(8) What is the amount of damages which MR. BURNABY is entitled to recover under the terms of his contract with STANDARD FIRE INSURANCE COMPANY, including interest at 7%?

$- 235990.86 -

(9) Did the defendant, STANDARD FIRE INSURANCE COMPANY breach its duty to deal fairly and in good faith with the plaintiff?

Yes ✓ No _____

If you answer Question No. 9 "no", then answer Question No. 11. If you answer Question No. 9 "yes", then answer Question No. 10.

(10) Was the defendant, STANDARD FIRE INSURANCE COMPANY's breach of the duty of good faith and fair dealing a legal cause of loss or damage to the plantiff?

Yes ✓ No _____

(11) Did the defendant, STANDARD FIRE INSURANCE COMPANY knowingly commit one or more of the unfair and deceptive practices prohibited by California Insurance Code Section 790.03, the Unfair Practices Act?

Yes ✓ No _____

If your answer to Question No. 11 is "no", proceed to Question No. 13. If you answer Question No. 11 "yes" as to plaintiff, then answer Question No. 12.

(12) Was the defendant, STANDARD FIRE INSURANCE COMPANY's knowing commission of an unfair and deceptive practice prohibited by the Unfair Practices Act, Section 790.03 of the California Insurance Code, a legal cause of loss or damage to the plaintiff?

Yes ✓ No _____

(13) Did STANDARD FIRE INSURANCE COMPANY have a fiduciary relationship with the Plaintiff?

Yes ✓ No _____

If your answer to Question No. 13 is "no", proceed to Question No. 16. If you answer Question No. 13 "yes" as to plaintiff, then answer question no. 14.

(14) Did the defendant, STANDARD FIRE INSURANCE COMPANY breach the fiduciary duty it owed to the plaintiff?

Yes ✓ No ____

If you answer Question No. 14 "no" then proceed to Question No. 16. If you answer Question No. 14 "yes", then answer Question No. 15.

(15) Was the defendant, STANDARD FIRE INSURANCE COMPANY's breach of fiduciary duty a legal cause of loss or damage to the plaintiff?

Yes ✓ No ____

(16) What do you find to be the total amount of damages suffered by the plaintiff legally resulting from the breach by STANDARD FIRE INSURANCE COMPANY of the duty to deal in good faith and fairly with the plaintiff, or from STANDARD FIRE INSURANCE COMPANY's commission of the unfair and deceptive acts prohibited by California Insurance Code Section 790.03(h), the Unfair Practices Act, or by the breach of the fiduciary duty STANDARD FIRE INSURANCE COMPANY owed to the plaintiff, excluding the damages listed in Question No. 8, if any, and excluding punitive damages?

$ 600,000.00] reduced to $200,000.- by plaintiff's consent to reduction

Dated: 10/27/89

FOREPERSON

We, the jury in the above-entitled case, find the following Special Verdict on the questions submitted to us:

Question No. 1: Was STANDARD FIRE INSURANCE COMPANY guilty of malice?

Answer "yes" or "no".

Answer: No

Question No. 2: Was STANDARD FIRE INSURANCE COMPANY guilty of fraud?

Answer "yes" or "no".

Answer: Yes

Question No. 3. Was STANDARD FIRE INSURANCE COMPANY guilty of oppression?

Answer "yes" or "no".

Answer: No

Question No. 4: What is the amount of punitive damages, if any, to be imposed against the defendant, STANDARD FIRE INSURANCE COMPANY?

Answer: $ 500,000.00

Dated: 10/31/89

FOREPERSON

It appearing by reason of said special verdict that:

FRANK BURNABY is entitled to judgment against The Standard Fire Insurance Company and Does 1-25,

Now, therefore, it is ordered, adjudged and decreed that said plaintiff, Frank Burnaby

have and recover from said defendants, The Standard Fire Insurance Company and Does 1-25, the sum of $1,335,990.86.

$935,950.86

with interest at the rate of ~~seven~~ ten per cent per annum from the date of the verdict until paid together with INTEREST costs and disbursements amount to the sum of $ 79,000.45

Dated October 31, 1989

JUDGE OF THE SUPERIOR COURT
RICHARD G HARRIS

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 1 DATE: 06/30/93

Haight, Brown & Bonesteel
Roy G. Weatherup
1620 26th Street
Suite 4000 North
Santa Monica, CA 90404

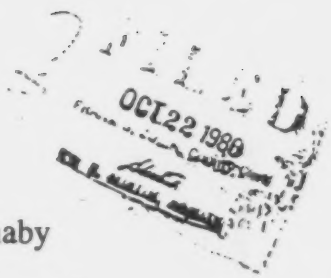
RE: Burnaby, Frank
vs.
Standard Fire Insurance
2 Civil B047665
Los Angeles NO. WEC089584

THE COURT:
Petition for rehearing denied.

APPENDIX D

Law Offices
Fadem, Berger & Norton
A Professional Corporation
501 Santa Monica Boulevard
Post Office Box 2148
Santa Monica, California 90406
Telephone (213) 451-9951

Attorneys for Plaintiff Frank Burnaby



SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

FRANK BURNABY, Plaintiffs, vs. THE STANDARD FIRE INSURANCE COMPANY AND DOES 1 - 25, Defendants.	No. WEC089584

SECOND AMENDED COMPLAINT FOR:

- BREACH OF INSURANCE POLICY;
- BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING;
- BREACH OF FIDUCIARY DUTY;

APPENDIX E

- BREACH OF STATUTORY DUTY;
- INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; AND
- FRAUD

Plaintiff alleges:

ALLEGATIONS OF BASIC FACTS

The Parties

1

Frank Burnaby owns the home at 20743 Rockpoint Road, Malibu, California (the Subject Property).

2

The Standard Fire Insurance Company is a Connecticut corporation doing business in California.

3

The true names or capacities, whether individual, corporate, associate, or otherwise of Does 1 through 25 are unknown to Mr. Burnaby, who sues these defendants by fictitious names. Mr. Burnaby will amend this Complaint to show the defendants' true names and capacities when ascertained.

4

Each defendant is the agent of the other defendants and each, acting within the purpose and scope of that agency, contributed to Mr. Burnaby's damage. Each defendant ratified and approved the acts of the other defendants. (The Standard Fire Insurance Company and Does 1 through 25 are referred to as Standard.)

The Policies

5

On or about December 20, 1983, Standard issued policy No. 214 HO 780745 PCS-V (the 1983 Policy) to Mr. Burnaby, insuring the Subject Property against all risk of physical loss. (Exhibit A) Standard also insured the Subject Property from November 28, 1981 to November 28, 1982 under policy No. 83 HO 755929 PCS (the 1981 Policy). (Exhibit B) (Collectively, Exhibits A and B are the Policies.)

6

Mr. Burnaby bought the Policies from Standard's agent, Dick Poast, based on Mr. Poast's representations that the Policies would provide insurance against physical injury to the Subject Property, including loss of use.

7

Mr. Burnaby has paid all premiums and performed all conditions to be performed by him under the provisions of the Policies.

Causes of Damage to the Subject Property

8

The Subject Property is on a hillside in the Big Rock area of Malibu (the Hillside). The Hillside is the site of ancient landslide. As early as 1978, that landslide reactivated, destabilizing the land under the Subject Property.

9

Reactivation of the landslide was proximately caused by the negligence of third parties who:

- removed support for the Subject Property by cutting into the Hillside for construction of Pacific Coast Highway;
- removed slide debris from Pacific Coast Highway without providing replacement stabilization;
- permitted construction of homes on a known landslide without a sewer system; and
- introduced water into the subsurface of the Hillside without an adequate means of removing it.

10

In September 1983, the County of Los Angeles wrote letters to Big Rock area homeowners warning about the threat to their safety and property from the Big Rock Mesa landslide. Mr. Burnaby did not receive a warning letter. At County conducted meetings, Mr. Burnaby was shown maps of the Big Rock Mesa landslide which showed the Subject Property outside the landslide area.

11

In or around November 1983, Mr. Burnaby telephoned Standard's agent, Dick Poast of Valley Heart Insurance Agency, to verify that his homeowners insurance coverage was in force. Mr. Burnaby was told that his 1981 Policy had lapsed in 1982. He requested that it be reinstated.

12

When Mr. Burnaby requested reinstatement, and in telephone calls with Mr. Poast and his employees during November and December 1983, Mr. Burnaby explained that he lived near, but had been told his property was not within, the boundaries of the Big Rock Mesa landslide. He said that there was some minor cracking in and around his home. Mr. Burnaby requested that this information be given to Standard as part of his application for reinstatement of coverage. Mr Poast told Mr. Burnaby that his request had been complied with and that there was no problem reinstating his homeowners insurance with Standard.

13

Standard insured 14 other properties in the Big Rock area. When Standard sold Mr. Burnaby the 1983 Policy providing homeowners insurance coverage, Standard knew about the Big Rock Mesa landslide.

14

As geotechnical experts studied the Big Rock Mesa landslide, they revised their understanding of the landslide boundary. The Big Rock Mesa landslide is now known to include the Subject Property within its boundaries.

The Claim

15

Beginning in early 1984, Mr. Burnaby noticed that cracking in and around his home had become worse. Larger, more numerous cracks appeared in the walls, brickwork, and foundation of the Subject Property. Mr. Burnaby believed this damage was caused by landsliding. That damage continues and worsens daily.

16

On May 9, 1984, Mr. Burnaby wrote Standard that:

- his home had suffered damage from the Big Rock Mesa landslide which:
  - — may result in total loss; and
  - — will likely force him to relocate; and
- he was making a claim for that loss.

17

The structural damage from the landslide is progressive and continuing. The land underlying the Subject Property is destabilized. Mr. Burnaby has lost full use of his home.

Movement continues.

Mr. Burnaby can neither sell nor rent his home, which continues to deteriorate.

FIRST CAUSE OF ACTION

(For Breach of Insurance Policy)

18

Mr. Burnaby incorporates paragraphs 1 through 17.

19

The Policies insure against loss caused by the actions of third parties. Where a proximate cause of damage is third party acts, such acts are insured risks within an "all physical loss" property damage policy, even though the mechanism of loss is an excluded peril.

20

Because damage has been continuous, progressive and deteriorating during more than one Policy period, Standard is liable under both Policies.

21

Mr. Burnaby's losses, proximately caused by the actions of third parties, are insured physical losses. Mr. Burnaby is entitled to benefits under the Policies.

22

The Policies require Standard to pay for insured losses to a maximum of:

- $176,000 (plus increases in coverage described at page 10, paragraph 15 of Exhibit B) for damage to or loss of Mr. Burnaby's home and appurtenant structures; and
- $32,000 for loss of use.

23

The cost to repair the landslide damage to the Subject Property by stabilizing the underlying land exceeds the maximum limits of insurance coverage under the Policies. Therefore, a Policy limits payments was due [*sic*] when Mr. Burnaby made his claim.

24

Standard knew Mr. Burnaby was living in a dangerous situation. But, for more than 3 months, Standard did not even acknowledge receipt of Mr. Burnaby's claim. Standard did not promptly investigate Mr. Burnaby's loss.

For more than a year, Standard refused to acknowledge or deny coverage for Mr. Burnaby's loss.

25

Standard knew it had insured the Subject Property from 1981 through 1982. Standard knew the Big Rock Mesa landslide was moving in 1981 and continuously thereafter.

But on August 7, 1985, Standard denied coverage and attempted to rescind the 1983 Policy.

26

Standard's delay, denial of the Policies' benefits, and attempted rescission are a breach of its duties under the Policies. That breach caused Mr. Burnaby to suffer damages in excess of $208,000.

SECOND CAUSE OF ACTION

(Fraud)

27

Mr. Burnaby incorporates paragraphs 1 through 17 and 19 through 26.

28

Standard, through the sales presentation of its agent Dick Poast, represented to Mr. Burnaby that he was insured against physical injury to or destruction of the Subject Property, including loss of use of the Subject Property.

29

Standard made these representations to induce Mr. Burnaby to enter into contracts for insurance and to pay premiums for the Policies. Mr. Burnaby relied on these representations, entered into the contracts of insurance, paid

premiums, and, believing that coverage was provided, refrained from obtaining other insurance.

30

Standard never intended to comply with its representations and, in fact, has consistently refused to do so. Standard made its representations with the intent to defraud Mr. Burnaby. Mr. Burnaby was unaware of Standard's intention not to perform pursuant to its representations. Under the circumstances, Mr. Burnaby's reliance on Standard's representations was reasonable.

31

As a proximate result of Mr. Burnaby's reasonable reliance on Standard's representations and Standard's intention, at the time those representations were made, not to perform them, Mr. Burnaby has sustained damages under the Policies in excess of $208,000, plus interest, and suffered anxiety, worry, and mental and emotional distress. Mr. Burnaby is also entitled to damages for his emotional distress.

32

Standard's fraud also entitles Mr. Burnaby to recover punitive damages under CCP §3294.

THIRD CAUSE OF ACTION

(For Breach of Duty of Good Faith and Fair Dealing)

33

Mr. Burnaby incorporates paragraphs 1 through 17, 19 through 26, and 28 through 32.

34

There is an implied covenant of good faith and fair dealing in the Policies that Standard will not do anything to prevent Mr. Burnaby from receiving the benefits he is entitled to under the Policies.

35

Standard breached the implied covenant of good faith and fair dealing in the Policies by:

- failing to investigate the causes of Mr. Burnaby's loss and his claim for benefits;
- failing to reasonably and promptly process Mr. Burnaby's claim for benefits;
- failing to provide a reasonable explanation for refusing to pay Mr. Burnaby for covered losses;
- failing to make a good faith attempt to reach a prompt, fair, and equitable settlement of the Burnaby claim when liability was reasonably clear;
- failing to make payments under the Policies when Mr. Burnaby was entitled to such payments;
- causing Mr. Burnaby to remain in a home which endangers his health and safety; and
- causing Mr. Burnaby to hire attorneys to bring this action to recover the benefits due under the Policies.

36

Standard's breach of the implied covenant of good faith and fair dealing has caused Mr. Burnaby to suffer financial hardship and anxiety, worry, and mental and emotional distress.

37

Mr. Burnaby's damages under the Policies exceed $208,000, plus interest.

Mr. Burnaby is also entitled to damages for his emotional distress.

38

Standard knows its breach of its duty of good faith and fair dealing is causing Mr. Burnaby financial hardship and emotional distress, in violation of Mr. Burnaby's rights under the Policies.

Standard has acted with conscious disregard of Mr. Burnaby's rights, intending to vex, injure, or annoy him. Those actions are oppressive, fraudulent, or malicious. Standard's conscious disregard of Mr. Burnaby's rights entitles him to punitive damages.

FOURTH CAUSE OF ACTION

(For Breach of Fiduciary Duty)

39

Mr. Burnaby incorporates paragraphs 1 through 7, 19 through 26, 28 through 32, and 34 through 38.

40

Standard's issuance of the Policies to Mr. Burnaby and acceptance of premiums from Mr. Burnaby created a fiduciary duty from Standard to Mr. Burnaby.

41

Mr. Burnaby placed his trust and confidence in Standard, believing that the Policies would provide:

- coverage for repair of physical damage to the Subject Property;
- financial security in the event of catastrophic loss of the Subject Property; and
- peace of mind.

42

Standard breached its fiduciary duty by:

- failing to investigate the causes of Mr. Burnaby's loss and his claim for benefits;
- failing to reasonably and promptly process Mr. Burnaby's claim for benefits;
- failing to provide a reasonable explanation for refusing to pay Mr. Burnaby for covered losses;
- failing to make a good faith attempt to reach a prompt, fair, and equitable settlement of the Burnaby claim when liability was reasonably clear;
- failing to make payments under the Policies when Mr. Burnaby was entitled to such payments;

- causing Mr. Burnaby to remain in a home which endangers his health and safety; and
- causing Mr. Burnaby to hire attorneys to bring this action to recover the benefits due under the Policies.

43

Standard's breach of its fiduciary duty has caused Mr. Burnaby to suffer financial hardship and anxiety, worry, and mental and emotional distress.

44

Mr. Burnaby's damages under the Policies exceed $208,000, plus interest.

Mr. Burnaby is also entitled to damages for his emotional distress.

45

Standard knows its breach of its fiduciary duty is causing Mr. Burnaby financial hardship and emotional distress, in violation of Mr. Burnaby's rights under the Policies.

Standard has acted with conscious disregard of Mr. Burnaby's rights, intending to vex, injure, or annoy him. Those actions are oppressive, fraudulent, or malicious. Standard's conscious disregard of Mr. Burnaby's rights entitles him to punitive damages.

FIFTH CAUSE OF ACTION

(For Breach of Statutory Duty)

46

Mr. Burnaby incorporates paragraphs 1 through 17, 19 through 26, 28 through 32, 34 through 38, and 40 through 45.

47

Standard is regulated by California Insurance Code §790.03 which was enacted to protect purchasers of insurance such as Mr. Burnaby from unfair and deceptive practices in the business of insurance.

48

Standard knowingly violated its statutory duties to Mr. Burnaby by:

- misrepresenting to Mr. Burnaby pertinent facts about the coverage under the Policies (§790.03(h)(1));
- failing to acknowledge and act promptly on Mr. Burnaby's communications regarding his claim under the Policies (§790.03(h)(2));
- failing to adopt and implement reasonable standards for prompt investigation of Mr. Burnaby's claim (§790.03(h)(3));
- failing to affirm or deny coverage within a reasonable time (§790.03(h)(4));

- failing to offer Mr. Burnaby a prompt, fair, and equitable settlement for losses under the Policies as soon as the liability for those losses became reasonably clear (§790.03 (h)(5));
- failing to promptly provide a reasonable explanation for refusing to pay Mr. Burnaby for covered losses (§790.03(h)(13)); and
- causing Mr. Burnaby to hire attorneys to compel recovery of proceeds due under the Policies (§790.03 (h)(6)).

49

Standard's knowing violation of its statutory duties has caused Mr. Burnaby to suffer financial hardship and emotional distress.

50

Mr. Burnaby's damages under the Policies exceed $208,000, plus interest.

Mr. Burnaby is also entitled to damages for his emotional distress.

51

Standard knows that its violation of its statutory duties is causing Mr. Burnaby financial hardship and emotional distress, in violation of Mr. Burnaby's rights under the Policies.

Standard has acted with conscious disregard of Mr. Burnaby's rights, intending to vex, injure, or annoy him.

Those actions are oppressive, fraudulent, or malicious. Standard's conscious disregard of Mr. Burnaby's rights entitles him to punitive damages.

SIXTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress)

52

Mr. Burnaby incorporates paragraphs 1 through 17, 19 through 26, 28 through 32, 34 through 38, 40 through 45, and 47 through 51.

53

In view of its knowledge of Mr. Burnaby's entitlement to benefits and need for prompt payment of benefits under the Policies, Standard's refusal to pay benefits is outrageous conduct, which was likely to cause Mr. Burnaby financial hardship with consequent emotional distress.

54

By refusing to pay benefits, Standard acted intentionally or with reckless disregard of the probability that Mr. Burnaby would suffer emotional distress.

Standard's refusal has caused Mr. Burnaby to suffer emotional distress.

55

Mr. Burnaby is entitled to damages for his emotional distress.

WHEREFORE, Mr. Burnaby prays for:

1. Proceeds due under the Policies.
2. Damages for fraud according to proof, but in excess of $208,000.

3. Damages for breach of the Policies according to proof, but in excess of $208,000.

4. Damages for breach of fiduciary duty according to proof, but in excess of $208,000.

5. Damages for breach of the duty of good faith and fair dealing according to proof, but in excess of $208,000.

6. Damages for breach of statutory duties in an amount according to proof, but in excess of $208,000.

7. Interest on the damages from May 9, 1984.

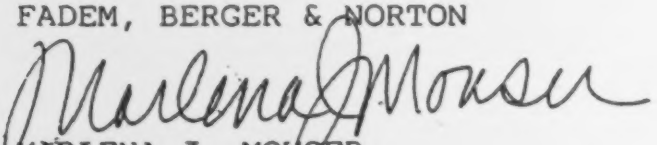
8. Damages for emotional distress.

9. Punitive damages.

10. Costs of suit.

11. Such other relief as the Court deems just.

FADEM, BERGER & NORTON



MARLENA J. MOUSER
Attorneys for Plaintiff
Frank Burnaby

BAJI 14.71 (1988 Revision)

If you find that plaintiff suffered damages as a [legal] result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evedence that said defendant was guilty of [oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

["Malice" means conduct which is [intended by the defendant to cause injury to the plaintiff] [or] [despicable conduct which is carried on by the defendant with a willful and conscious disregard for the [rights] [or] [safety] of others.] [A person acts with conscious disregard of the rights or safety of others when [he] is aware of the probable dangerous consequences of [his] conduct and willfully and deliberately fails to avoid those consequences.]

["Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.]

["Despicable conduct" is conduct which is so [vile,] [base,] [contemptible,] [miserable,] [wretched,] [or] [loathsome] that it would be looked down upon and despised by ordinary decent people.]

["Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of

thereby depriving a person of property or legal rights or otherwise causing injury.]

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound descretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant.

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.

[(3) The amount of actual damages.]

If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict.

The federal question in issue in the petition for writ of certiorari was timely and properly raised in the appellant's opening brief and petition for review filed by the Standard Fire Insurance Company on February 18, 1993, and July 9, 1993, respectively.

The Award of Punitive Damages, Based on a Finding of "Fraud," Must Be Reversed, Because No Fraud Claim Was Proved, or Even Pleaded, and Because It Was Unconsititutional.

The most unjust and pernicious aspect of the present judgment is the half million dollar award of punitive damages. This award is based on a jury finding of "fraud," even though the plaintiff never properly pleaded any such cause of action, withdrew his claim of "fraud" before trial, and never presented any evidence in support of the theory, and never asked that the theory be presented to the jury.

Civil Code section 3294(a) authorizes damages. It provides that, "where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Since the jury exonerated the defendant with respect to oppression and malice, it is necessary only to decide whether the award of punitive damages is justified on a "fraud" theory.

Civil Code section 3294(e) defines "fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." This definition appears to be a codification of the common law

definition of fraud, as found in cases such as *Lesperance v. North American Aviation, Inc.* 217 Cal.App.2d 336 (1963), and *Okun v. Morton*, 203 Cal.App.3d 805, 828 (1988).

Of course, there is no such thing as a cause of action for punitive damages. Rather, a claim for punitive damages is merely incident to some other cause of action. *Orient Handel v. United States Fidelity & Guaranty Company*, 192 Cal.App.3d 684,697 (1987). Although fraud alone is an adequate ground for awarding punitive damages, the plaintiff must prove every essential element of fraud, including justifiable reliance. 192 Cal.App.3d at 697.

Fraud must be pleaded with particularity. *Scafidi v. Western Loan & Building Company,* 72 Cal.App.2d 550, 553 (1946). The rule that fraud must be pleaded with specificity is the "last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings." *Committee on Children's Television, Inc. v. General Foods Corporation,* 35 Cal.3d 197, 216-217 (1983). The specificity requirement also serves the purpose of notifying the defendant of certain definite charges, so that the defendant will be able to meet them intelligently. 35 Cal.3d at 216.

Where a complaint contains no allegation of oppression, fraud, or malice, and no demand for punitive damages, there is no basis for awarding any such damages. *Lorenz v. Hunt*, 89 Cal.App. 6, 15-16 (1928); *Syfert v. Solomon,* 95 Cal.App. 228, 237 (1928); *Hall v. Berkell,* 130 Cal.App.2d 800, 804-805 (1955); *Goodwin v. Wolpe,* 240 Cal.App.2d 874, 879-880 (1966).

The leading recent case analyzing the right to recover punitive damages on a fraud theory is *Common-*

wealth Mortgage Assurance Company v. Superior Court, 211 Cal.App.3d 508 (1989). In this case, the trial court granted summary adjudication of the issue of punitive damages, finding that the plaintiff had no right to recover such damages. 211 Cal.App.3d at 517. The Court of Appeal disagreed with the reasoning of the trial court, but upheld its ruling, finding the plaintiff's common law fraud theory inadequate. 211 Cal.App.3d at 517. The court noted that, "[i]f no cause of action for fraud has been stated, there is nothing to which punitive damages can attach." 211 Cal.App.3d at 518.

The Court of Appeal in *Commonwealth Mortgage* analyzed the factual allegations madde by the plaintiff, and found that necessary elements of a fraud cause of action, including justifiable reliance and damage, were lacking. 211 Cal.App.3d at 518-521. Thus, the court concluded, "[a]s the pleading fails to state a cause of action for fraud, there is nothing to which a claim for punitive damages can attach," and "the trial court properly granted summary adjunication of the issue that CMAC [the plaintiff] could not recover punitive damages." 211 Cal.App.3d at 521.

In light of the *Commonwealth Mortgage* case, it was manifest error for the trial judge to submit the claim for punitive damages on a fraud theory to the jury. Since the plaintiff abandoned his purpoported cause of action for fraud even before the trial began, there was no legal ground for awarding punitive damages for "fraud." Moreover, there was no evidence of "fraud", even if the issue had been properly before the court.

In light of the above authorities, the half million dollars award of punitive damages based on a finding of "fraud" is contrary to California Law. The award must be

stricken. If, however, the award were deemed to comport with California Law, it would represent a violation of the Constitution of the United States of America. *Pacific Mutual Life Insurance Company v. Haslip*,__ U.S. __ 111 S. Ct. 1032 (1991). The constitutional guarntee of due process of law imposes some limits on awards of punitive damages in state court. If a jury may award punitive damages on the basis of a legal theory not even presented to it, then there are no constitutional safeguards at all, and the award violates the federal constitution, as well as all civilized concepts of justice and equity.

The Standard Fire Insurance Company was never given the opportunity to defend itself against any claim of "fraud," since no claim was made at trial. Even the word "fraud" came into the case only when the court instructed the jury with respect to the question of awarding punitive damages.

The award of the policy benefit to Mr. Burnaby is wrong. The award of extracontractual compensatory damages is even more offensive. The half million award of punitive damages is, simply, an outrage.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on November 24, 1993, I served the within *Appendix To Petition for Writ of Certiorari, Volume I of II (Appendix A to G)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: Original and 40 Copies)

Mr. Michael M. Berger
Berger & Norton
1620 26th Street
Suite 200 South
Santa Monica, CA 90404
(Attorneys for Frank Burnaby)

Clerk, California Supreme Court
303 Second Street, South Tower
San Francisco, California 94107-1317

Clerk, California Court of Appeal
Second Appellate District
Division One
300 South Spring Street
Second Floor, North Tower
Los Angeles, California 90013

Mr. Tod A. Hindin
10940 Wilshire Blvd.
17th Floor
Los Angeles, California 90024
(Attorney for Respondent Frank Burnaby)

Clerk of the Superior Court for
the County of Los Angeles
Honorable Richard G. Harris, Judge
1725 Main Street, Department P
Santa Monica, California 90401

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 24, 1993, at Los Angeles, California.

Betty J. Malloy
(Original Signed)